In the
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-428

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS and DISTRICT 147 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Petitioners,

v.

NORTHEAST AIRLINES, INC. and DELTA AIR LINES, INC.,
Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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The respondent Delta Air Lines, Inc. ("Delta")[1] respectfully submits that the issues which would be presented

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[1] Despite the express allegation in their amended complaint that Northeast Airlines, Inc. ("Northeast") no longer exists (A-II at 34), the petitioners persistently attempt to refer to Northeast as if it were a party separate and distinct from Delta. In fact and in law, however, on August 1, 1972 Northeast ceased to have a separate corporate existence, and there is but one respondent now before this Court. Therefore, both in the title and text of this Brief, Delta has disregarded the petitioners' fiction that there are two respondents and has consistently used the singular.

in this case are not worthy of consideration by this Court on writ of certiorari and therefore the Petition should be denied.

Opinions Below

The opinion of the United States District Court for the District of Massachusetts denying injunctive relief is reported at 337 F. Supp. 499. The opinion of the Court of Appeals for the First Circuit on interlocutory appeal is reported at 473 F.2d 549. This Court's denial of the petition for writ of certiorari to review that decision is reported at 409 U.S. 845.

The final decision of the District Court (Appendix E to the Petition) is reported at 400 F. Supp. 372, but its order denying reconsideration (Appendix C to the Petition) is unreported. The opinion of the First Circuit affirming the District Court (Appendix B to the Petition) is reported at 536 F.2d 975.

Jurisdiction

The basis on which jurisdiction is claimed is set forth adequately in the Petition.

Questions Presented

1. Did the courts below err in holding, in accordance with unanimous precedent, including decisions by the Courts of Appeals for the Second, Sixth, Seventh and District of Columbia Circuits, that questions of modification of the labor protective provisions imposed by the Civil Aeronautics Board in connection with an airline merger and/or implementation of those labor protective provisions

are within the exclusive jurisdiction of the Civil Aeronautics Board?

2. Did the Court of Appeals for the First Circuit err in holding, following the *Switchmen's Union* trilogy and numerous other decisions of this Court and other federal courts, that questions of representation of employees of air carriers for purposes of collective bargaining pursuant to the Railway Labor Act are within the exclusive jurisdiction of the National Mediation Board?

Statutes Involved

Sections 2 Fourth and 204 of the Railway Labor Act (45 U.S.C. §§ 152 Fourth, 184) and Sections 408 and 1006 of the Federal Aviation Act of 1958, as amended (49 U.S.C. §§ 1378, 1486) are reproduced in relevant part in the appendix to this Brief (pp. 27-30 *infra.*)

Statement of the Case

The International Association of Machinists and Aerospace Workers and its District 147 (collectively the "Union"), the plaintiffs-appellants below and petitioners in this Court, claim that Delta Air Lines, Inc. ("Delta") should be ordered by the federal courts to recognize and bargain with the Union on behalf of a minority group of Delta employees with respect to "proper provisions for the protection of employees' seniority and other rights." (A-II[2] at 40.) The only basis of the Union's claim is that, prior to the 1972 merger of Northeast Airlines, Inc.

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[2] The record appendices are cited herein by the abbreviations "A-I" to designate the Appendix in First Circuit No. 72-1038, which was incorporated by Order of the Court of Appeals dated November 25, 1975, and "A-II" to cite the further Appendix prepared for First Circuit No. 75-1435.

("Northeast") into Delta, the Union represented certain crafts or classes of Northeast's employees.[3] The United States District Court for the District of Massachusetts entered summary judgment dismissing the Union's amended complaint on July 25, 1975 and denied reconsideration on October 8, 1975, and the Court of Appeals for the First Circuit affirmed that dismissal on June 25, 1976.

When the Union brought the present action on January 24, 1972 in the District of Massachusetts, it sought an injunction against the merger of Northeast into Delta and orders requiring Northeast to bargain with the Union concerning the conditions of post-merger employment by Delta of former Northeast employees and further requiring the results of such bargaining to be incorporated in "any final merger agreement with Delta" (A-I at 8-9). The District Court denied injunctive relief. (A-I at 79-92.) On appeal, the First Circuit held, among other things, that the courts are without jurisdiction to consider the Union's allegations that Northeast had violated the collective bargaining agreements between Northeast and the Union[4] and that Northeast had no duty to bargain with the Union in advance of the merger concerning post-merger conditions of employment by Delta. (A-II at 4-23.) This Court denied the

[3] One group (Northeast's mechanics and related employees) was covered by a collective bargaining agreement which expired by its terms on December 31, 1971 but, in effect, continued in force until August 1, 1972 as the "status quo" pursuant to Section 6 of the Railway Labor Act, 45 U.S.C. § 156, by reason of the pendancy of negotiations and/or mediation. A second group (Northeast's technical services department foremen and field service technicians) was covered by a separate contract which expired June 1, 1972; the "status quo" provisions of Section 6 were applicable to this group also until August 1, 1972.

[4] The District Court had considered and interpreted those collective bargaining agreements and decided that Northeast was not in violation thereof. The Court of Appeals held that the interpretation of those agreements and enforcement of rights pursuant thereto are matters within the exclusive jurisdiction of the System Board of Adjustment.

Union's first petition for a writ of certiorari on October 10, 1972.

Meanwhile, the Civil Aeronautics Board (the "CAB"), by a decision dated April 24, 1972 and subsequently approved by the President of the United States on May 19, 1972, authorized the merger of Northeast into Delta subject to various conditions. (A-II at 47-78.) The Union had participated actively as a party before the CAB. (See, *e.g.*, A-II at 55, 59, 72.) In its Orders Nos. 72-5-73 and 72-5-74 whereby the merger was authorized, the CAB discussed various labor problems and considerations (A-II at 55-60), prescribed extensive "labor protective provisions" concerning seniority and other interests of employees which might be affected by a merger (A-II at 60-71) and retained jurisdiction over labor protective aspects of the merger (A-II at 76).[5] The Union on July 11, 1972 petitioned the CAB for modification of those labor protective provisions, and the CAB denied that petition. CAB Orders Nos. 72-7-74, 72-12-114.[6] The Union did not petition for judicial review of any of those four CAB orders pursuant to Section 1006 of the Federal Aviation Act of 1958, 49 U.S.C. § 1486.

Subsequent to the first decision of the Court of Appeals in the present litigation, with respect to which the Union filed and this Court denied a petition for a writ of certiorari, the Union submitted to the duly constituted System Board of Adjustment its claims that Northeast had violated the collective bargaining agreements between Northeast and the Union, and that Board, after hearing, decided adversely to the Union. The submission of those claims to the System

[5] The CAB's labor protective provisions also contained a special procedure for resolution of disputes thereunder. If a dispute concerning the effects of the merger on employees remains unsettled for 20 days after the controversy arises, it may be referred by any party to an arbitrator for an expedited determination. (A-II at 70-71.)

[6] CAB Order No. 72-12-114 is for the convenience of the Court reproduced in the appendix to this Brief (pp. 31-32 *infra*).

Board of Adjustment was initiated by a grievance dated April 24, 1972 in which the Union alleged that Northeast had violated the collective bargaining agreements and requested "all necessary relief including an injunction and damages". (A-II at 79.) That grievance was then referred to the System Board, which held a hearing. After meeting three times, the four-man System Board declared itself deadlocked and voted "to submit the dispute to a neutral for a decision". (A-II at 81.) The neutral ruled against the Union's grievance. (A-II at 84.) The Union has never presented any other grievance—nor has the Union initiated any other System Board of Adjustment proceeding—concerning the subject matter of the present litigation. (A-II at 45.) Nor did the Union seek judicial review of the decision of the System Board of Adjustment pursuant to the Railway Labor Act. See 45 U.S.C. §§ 153 First (q), 184.

The merger of Northeast into Delta, pursuant to the approval of the CAB and the President, was consummated on August 1, 1972 (A-II at 34), but this case lay dormant until October of 1973, more than 14 months later (A-II at 2). On October 4, 1973, the Union amended its complaint by modifying certain allegations so as to refer to both Northeast and Delta and by adding prayers for "damages of five hundred thousand dollars ($500,000.00)" and for preliminary and permanent injunctive relief against Delta. (A-II at 26-41.) The Union now asks for, in effect, a mandatory injunction against Delta "restraining" Delta from

> "refusing to recognize and bargain with the plaintiffs [Union] on behalf of all their members and former members formerly employed by the company [Northeast] who are now or were at any time after the merger employed by Delta Airlines [*sic*], Inc., over proper provisions for the protection of employees' seniority and other rights." (A-II at 40.)

On July 25, 1975 the District Court granted Delta's motion for summary judgment:

> "The Union seeks an order from this Court directing Delta to negotiate with the Union regarding the seniority rights of the employees it claims to represent. The subject matter of the request[ed] relief is explicitly covered by the order and opinion of the CAB approving the merger. . . . That the CAB has exclusive jurisdiction over disputes covered by the merger order is equally well-established." (A-II at 99.) (Citations omitted.)

On August 4, 1975, the Union filed a Motion To Alter, Amend and Vacate a Judgment (A-II at 102-04) which was subsequently denied.

On appeal, the First Circuit likewise held that the matters complained of by the Union are not within the jurisdiction of the courts:

> "[J]urisdiction in the first instance to rule on compliance with its own Labor Protective Provisions and to determine the validity of the seniority lists belongs with the CAB, notwithstanding any diffidence it may have shown toward undertaking this task. [Citations omitted.] Therefore, to the extent that plaintiffs [the Union] attack the seniority lists, and argue that the procedures Delta followed in integrating them were inconsistent with the commands of the Labor Protective Provisions, the district court correctly ruled that it did not have jurisdiction.
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> . . . .
>
> [T]he duty to bargain imposed by the Railway Labor Act is a duty to bargain with the chosen representative of the majority of a craft or class of employees.

> [Citations omitted.] At the very least, the merger created real doubts about whether plaintiffs [the Union] represent the majority of any Delta craft or class of employees, and where there is such doubt, federal courts leave resolution of the dispute to the National Mediation Board. [Citations omitted.]" 536 F.2d at 977.

The present Petition asks this Court to review these two rulings.

Argument

The Union asks this Court to believe that the decision of the Court of Appeals for the First Circuit destroyed statutory and contractual rights and disrupted labor relations in the air transportation industry, but the fact is just the opposite. The decision of the court below reaffirmed well-established principles which have been utilized successfully in airline mergers for at least twenty-five years. What the Union suggests, in contrast, would be a radical new departure and would be totally unworkable as a rule of labor relations in the context of a merger. Indeed, the Union's arguments confuse the relevant principles and, if accepted, would cause havoc in any future airline merger.

It is well settled, as the Court of Appeals held in this case, that there are two guiding and overriding principles of law which govern. *First,* as to employee relations matters arising directly out of an airline merger, the CAB's detailed labor protective provisions, which expressly cover seniority integration, dismissal allowances, displacement allowances, moving expenses and the like, are controlling. The Courts of Appeals for the First, Second, Sixth, Seventh and District of Columbia Circuits have uniformly held that all matters having to do with implementation or modification of these labor protective provisions

are within the exclusive jurisdiction of the CAB (see pp. 12-15 *infra*), and only last year this Court declined to review three recent decisions of the Court of Appeals for the District of Columbia Circuit precisely on this point (see pp. 14-15, 17 *infra*). *Second,* for purposes of any post-merger collective bargaining, the provisions of the Railway Labor Act apply, and therefore a union may represent or bargain for any group of employees only if that union has met the representation requirements of the Railway Labor Act. The decisions of this Court in the *Switchmen's Union* trilogy, which have been consistently followed in merger situations, including airline merger cases in the Second and Sixth Circuits, establish beyond question that the determination as to who can bargain for employees pursuant to the Railway Labor Act is entrusted to the exclusive jurisdiction of the National Mediation Board ("NMB"). (See pp. 20-22 *infra.*)

With respect to seniority integration, the arguments in the Petition confuse the principles of the Railway Labor Act with those applicable to the CAB's labor protective provisions. In complaining that the seniority lists of the Northeast and Delta mechanics were not properly consolidated, the Union does not charge that the integrated list is in any respect unfair or inequitable. Nor has the Union pursued the arbitration remedy provided by the CAB's labor protective provisions (see p. 5 n.5 *supra*) or sought judicial review of the CAB's orders. Rather, the Union objects to the integrated seniority list solely on a ground the CAB has repeatedly held invalid: that the Union, which was formerly certified as the representative of the Northeast employees for purposes of the Railway Labor Act, did not negotiate the merger of the lists. The CAB has ruled that, because of the conflicting interests of employees following a merger, a former Railway Labor Act representative will not be recognized as the employees' repre-

sentative for seniority integration purposes in the absence of a new and specific designation, and in the present case the Union does not contend that it was so designated. Moreover, the Union did file a petition to the CAB for amendment or modification of and additions to the labor protective provisions (see pp. 17, 31-32 *infra*), but when the CAB denied relief the Union again failed to seek review in a court of appeals. The Union's attempt to challenge the CAB's labor protective provisions and particularly the CAB's seniority integration rules in this case is an impermissible collateral attack on the CAB's orders in derogation of the exclusive procedure for judicial review established by the Federal Aviation Act of 1958. (See pp. 17-18 *infra*.)

The Union also advances an alternative theory—suggested for the first time in the Court of Appeals[7]—which flies in the face of the many decisions of this Court and other federal courts declaring the areas of exclusive jurisdiction of the NMB and the System Board of Adjustment pursuant to the Railway Labor Act. (See pp. 20-24 *infra*.) The Union's contention, in short, is that, because of provisions in the Union's contracts with Northeast which called for bargaining in case of a merger, Delta is required to negotiate post-merger to determine which, if any, contract provisions survived the merger. The Union's argument ignores the fact that under the Railway Labor Act it has no right to bargain with Delta until and unless it has been certified by the NMB as the representative of a craft or class of Delta's employees. The Union admits that it has not been—and indeed could not become—so certified. Moreover, the Union ignores the fact that all its contractual

[7] Contrary to the Union's statement (Petition at 7), the First Circuit did not hold that the District Court had erred in any of its rulings of law. Rather, the Union presented its claims quite differently on appeal, and as a result the First Circuit noted that the District Court had underestimated the breadth and scope of the Union's bargaining demands.

claims, including any claim for "damages", were subject to the exclusive jurisdiction of the System Board of Adjustment, which is the exclusive forum for enforcement of contractual rights. *Slocum* v. *Delaware, L. & W.R.R.*, 339 U.S. 239; *Pennsylvania R. Co.* v. *Day*, 360 U.S. 548; *Andrews* v. *Louisville & N.R.R. Co.*, 406 U.S. 320. The System Board decided adversely to the Union the only relevant claim the Union has ever presented to that Board.

I. The issues the Petition seeks to raise are not of such importance as to warrant the attention of this Court.

The airline industry consists of a relatively small number of carriers and is marked by a high degree of administrative regulation. Accordingly, a merger of air carriers is an extraordinary transaction which requires prior approval of the CAB and, if any foreign routes are involved, the President. Because of the infrequency of such mergers and the provisions for administrative and executive approval, any merger of airlines is specially tailored in great detail. The merger of Northeast into Delta was no exception, and many detailed conditions and provisions were imposed by the CAB after the CAB had held lengthy hearings and considered briefs, arguments, exceptions and other material.

Moreover, the issues the Union seeks to raise in its Petition would have limited—if any—applicability beyond the particular facts of the Northeast/Delta merger. It is apparent from the Union's pleadings and its arguments to this Court that the Union's claims in the present case have their roots in the language of particular provisions of the pre-merger contracts between Northeast and the Union and the particular labor relations circumstances of Northeast and of Delta at the time of the merger in 1972.

Finally, the merger of Northeast into Delta was consummated more than four years ago. The former Northeast employees formerly represented by the Union (less than five per cent of Delta's employees) had been absorbed into Delta long before the Union presented to the District Court the amendment to its complaint—the earliest pleading which even purports to state a claim against Delta. If Delta were to undertake, as the Union demands, now to renegotiate and retroactively to alter the established relationships between the former Northeast employees and their fellow Delta employees with whom they have been working side by side for more than four years, the result would be disruption of labor relations which are presently stable. The Union's demands would tend to prevent harmonious relations among all Delta employees of each craft or class—the goal the Railway Labor Act seeks to attain—by creating conflict between those Delta employees formerly represented by the Union and other Delta employees.

II. The law is well settled that the CAB has exclusive jurisdiction with respect to modification and implementation of the CAB's labor protective provisions for the Northeast/Delta merger and that the CAB's Orders may not be attacked collaterally.

The approval of mergers between air carriers and the fashioning of post-merger labor protective provisions are matters entrusted by Congress to the exclusive jurisdiction of the CAB under the provisions of Section 408 of the Federal Aviation Act of 1958 (49 U.S.C. § 1378). *American Airlines, Inc.* v. *CAB*, 445 F.2d 891, 895 (2nd Cir. 1971), *cert. denied*, 404 U.S. 1015; *Kent* v. *CAB*, 204 F.2d 263 (2nd Cir. 1953), *cert. denied*, 346 U.S. 826; *International Association of Machinists and Aerospace Workers* v. *Northeast*

Airlines, Inc., 473 F.2d 549 (1st Cir. 1972), *cert. denied*, 409 U.S. 845. Inasmuch as Northeast and Delta were air carriers, their merger required prior CAB approval pursuant to Section 408.

The CAB's Orders which approved the merger of Northeast into Delta contain extensive labor protective provisions, developed by the CAB in its expertise over a period of more than two decades, which are twelve printed pages in length. In those provisions the CAB (*1*) established the rules under which Delta, as the surviving carrier, must absorb former Northeast employees, including specific rules for integration of seniority lists (A-II at 61), displacement allowances (A-II at 61-62), continuation of benefits (A-II at 66), moving expenses (A-II at 66-67), protection against loss on sale or termination of lease of residence (A-II at 67-69) and notices of proposed changes (A-II at 69-70), (*2*) provides monetary allowances for former Northeast employees who are not absorbed by Delta (A-II at 63-66; A-II at 70), (*3*) prescribes an expedited procedure for binding arbitration as the exclusive forum for disputes arising out of implementation of those rules (A-II at 70-71)[8] and (*4*) retains exclusive jurisdiction to decide whether and how those rules should be changed or supplemented (A-II at 60, 76). Those labor protective provisions are an integral part of the CAB's approval of the Northeast/Delta merger.

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[8]It is demonstrated at pp. 25-26 *infra*, that the decision in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, is not applicable to employers subject to the Railway Labor Act and is particularly inapplicable in the context of the Northeast/Delta merger. However, even if the *Wiley* decision could be applied by analogy, *Wiley* does not purport to grant any bargaining right and the arbitration right granted to employees as part of the CAB's labor protective provisions fully satisfies the public policy recognized by this Court in *Wiley*. See also p. 24 *infra*.

A. *The CAB has exclusive jurisdiction over all questions arising under or with respect to labor protective provisions.*

The courts have consistently held that the CAB has exclusive authority in connection with airline mergers to determine what labor protective provisions are appropriate to protect employees in a manner consistent with the public interest and to judge the implementation of those provisions. Thus, in *Kesinger* v. *Universal Airlines, Inc.*, 474 F.2d 1127, 1131-32 (1973), the Sixth Circuit held

> "that Congress intended that the CAB should have exclusive jurisdiction, in approving airline mergers, to prescribe conditions, including labor protective provisions, and to adjudicate questions arising with respect to compliance or non-compliance with such conditions."

Accord, Oling v. *Air Line Pilots Association*, 346 F.2d 270 (7th Cir. 1965), *cert. denied*, 382 U.S. 926; *Hyland* v. *United Air Lines, Inc.*, 254 F. Supp. 367 (N.D. Ill. 1966).

The exclusive jurisdiction of the CAB has been reaffirmed in a series of decisions in connection with the Northeast/Delta merger. In three cases, former Northeast pilots attempted in the United States District Court for the District of Columbia to attack, on a variety of grounds, the post-merger integrated seniority list of Delta pilots. In *Northeast Pilots Master Executive Council* v. *O'Donnell*, 81 L.R.R.M. 2731, 2732 (D.C.C. 1972), the court granted "the motion for summary judgment in favor of the defendants on the grounds that exclusive jurisdiction is in the Civil Aeronautics Board." Both in *Carey* v. *O'Donnell*, Civil Action No. 609-73 (D.D.C. May 16, 1973), *affirmed*, 506 F.2d 107 (D.C. Cir. 1974), *cert. denied*, 419

U.S. 1110, and in *Chaudoin* v. *ALPA*, 6 F.E.P. 107 (D.D.C. 1973), *affirmed*, 506 F.2d 107 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1110, the court held that the CAB has exclusive jurisdiction and therefore dismissed. In *Committee of Former Northeast Stewardesses* v. *CAB*, No. 75-1066 (May 27, 1975),[9] the Court of Appeals for the District of Columbia Circuit held that the request of a group of former Northeast flight attendants that Delta be ordered to submit to arbitration an alleged dispute regarding the integration of the flight attendant seniority lists of Delta and Northeast is within the CAB's exclusive jurisdiction. In *Wells* v. *Delta Air Lines, Inc.*, 398 F. Supp. 384, 390 (E.D. Pa. 1975), the complaint of a former Northeast employee was dismissed for lack of jurisdiction because "the CAB has exclusive jurisdiction over changes of employment relating to airline mergers."

It has also been well settled for more than twenty years that the pre-merger collective bargaining representative certified for purposes of the Railway Labor Act is not by virtue of that former certification the "representative of the employees affected" within the meaning of the CAB's labor protective provisions (see A-II at 61). *Braniff–Mid-Continent Merger Case*, 17 C.A.B. 19 (1953); *American-Trans Caribbean Merger Case*, CAB Order No. 71-6-71. The pre-merger union can establish a right to represent employees for purposes of the CAB's labor protective provisions only by presenting to the surviving carrier independent post-merger "evidence of authority" to represent them. *E.g., Delta-Northeast Merger Case*, CAB Order No. 75-1-6. As the CAB has noted,

> "significant changes in employer-employee relations resulting from a merger can result in different inter-

[9] The unreported decision of the Court of Appeals for the District of Columbia Circuit is for the convenience of the Court reproduced in the appendix to this Brief (pp. 33-34 *infra*).

ests between a union and its former members so that the employees would not necessarily want the union to represent them for labor protective purposes." *Delta-Northeast Merger Case,* CAB Order No. 73-9-42 at 5.

Accordingly, inasmuch as the Union has alleged neither that it has such evidence nor that it has presented such evidence to Delta, there is no merit in the Union's contention that it has bargaining rights pursuant to the CAB's labor protective provisions by reason of its former representation of certain Northeast employees for purposes of the Railway Labor Act.

In short, the subject matter of the Union's amended complaint in the present case—"seniority and other rights" (A-II at 40) of former Northeast employees—was plainly within the well-recognized exclusive jurisdiction of the CAB and also was expressly covered by the labor protective provisions for the Northeast/Delta merger which were adopted by the CAB (see pp. 12-13 *supra*). For example, integration of the Northeast and Delta seniority lists is expressly covered by Section 3 of the labor protective provisions (A-II at 61) but nevertheless occupies more than a third of the Union's argument in its Petition to this Court. Accordingly, there can be no doubt that the matters complained of by the Union in the present case were, as the Court of Appeals for the District of Columbia Circuit has repeatedly held in similar cases in connection with the same Northeast/Delta merger, within the exclusive jurisdiction of the CAB.

B. *The present case is an attempted collateral attack on a series of CAB Orders in plain disregard of the statutory method of review.*

The only proper remedy for a party aggrieved by a CAB order is to appeal directly to a court of appeals within sixty days after the CAB order pursuant to the special statutory procedure for judicial review established in Section 1006 of the Federal Aviation Act of 1958, 49 U.S.C § 1486 (reprinted on pp. 29-30 *infra*). See *Northeast Master Executive Council* v. *CAB,* 506 F.2d 97 (D.C. Cir. 1974), cert. denied, 419 U.S. 1110; *Wells* v. *Delta Air Lines, Inc., supra* at 386-87.

Prior to the CAB's decision approving the Northeast/Delta merger, the Union had a full and fair opportunity to present its position to the CAB in great detail and did present evidence and file exceptions and briefs. (A-II at 55, 59, 72.) When the CAB on May 19, 1972 issued its approval of the merger of Northeast into Delta upon terms and conditions, including labor protective provisions, with which the Union apparently was not wholly satisfied, the Union could then have sought review of CAB Orders Nos. 72-5-73 and 72-5-74 in a court of appeals as provided in Section 1006, but the Union took no such appeal. Instead, on July 11, 1972 the Union by petition asked the CAB to amend, modify and add to its labor protective provisions so as to require Delta to recognize the seniority of former Northeast employees and also requested that the merger be stayed pending such modification. The CAB denied the Union's request for a stay on July 21, 1972 in CAB Order No. 72-7-74, and on December 26, 1972, in its Order No. 72-12-114 (reprinted on pp. 31-32 *infra*), the CAB denied the Union's petition for modification of the labor protective provisions. The Union did not seek judicial review by a court of appeals of either CAB Order No. 72-7-74 or CAB

Order No. 72-12-114. Nor has the Union ever challenged either before the CAB or in a petition to a court of appeals for statutory judicial review the CAB's long-standing and consistent interpretation of the phrase "representative of the employees affected" as used in the labor protective provisions (see pp. 15-16 *supra*).

It is obvious that the present litigation is at best a tardy and collateral attack on the CAB's several orders as well as an attempt to avoid the CAB's exclusive jurisdiction. The courts have consistently refused to permit such collateral attacks upon CAB orders. "Section 1006 of the Federal Aviation Act . . . prescribes a direct and exclusive method of review, . . . [and it is a] well settled principle that collateral attacks upon administrative orders are not permissible." *Oling* v. *Air Line Pilots Association, supra,* 346 F.2d at 276-77; *accord, Kesinger* v. *Universal Airlines, Inc., supra; Carey* v. *O'Donnell,* 506 F.2d 107 (D.C. Cir. 1974), *cert. denied,* 419 U.S. 1110.

C. *The decision of the court below was not in conflict with any precedent.*

The Union's assertion that the decision of the court below is in conflict with this Court's recent decision in *Nader* v. *Allegheny Airlines, Inc.,* U.S. , 48 L.Ed. 2d 643, completely misconstrues the *Nader* decision. In *Nader,* this Court addressed only "the question whether a common-law tort action based on alleged fraudulent misrepresentation by an air carrier . . . must be stayed pending reference to the Board [CAB] for determination whether the practice is 'deceptive' within the meaning of § 411 of the Federal Aviation Act of 1958". 48 L.Ed. 2d at 648. But in the present case the question is not how to reconcile a common-law cause of action with the federal regulatory scheme but rather whether to continue harmonizing the

provisions of two federal statutes (the Federal Aviation Act of 1958 and the Railway Labor Act) and the roles of two federal agencies (the CAB and the NMB) which govern the activities of air carriers on the same well-established basis which has been used to harmonize them consistently and successfully for decades. Moreover, it was an essential premise of this Court's decision in *Nader* that "considerations of uniformity in regulation and of technical expertise" (48 L.Ed. 2d at 655) did not require deference to the CAB because the standards applicable to the common-law tort of fraudulent misrepresentation are clear and involve no judgments of reasonableness. In contrast, the present case involves the CAB's discretionary approval of an airline merger and the special tailoring of the conditions and provisions for that airline merger — matters which plainly must be left exclusively in the hands of the expert regulatory agency, the CAB. Finally, whereas in *Nader* this Court concluded that as a matter of law the CAB could not authorize the conduct alleged (48 L.Ed. 2d at 652-54), the present case involves the plenary power of the CAB to authorize airline mergers and prescribe the terms and conditions thereof, which power is well-established. (See cases cited pp. 12-13 *supra.*)

Contrary to the Union's claim, *Augspurger* v. *Brotherhood of Locomotive Engineers,* 510 F.2d 853 (8th Cir. 1975), is not in conflict with the decision of the court below in the present case. In *Augspurger,* the Court of Appeals for the Eighth Circuit not only recognized but specifically reaffirmed the mainstream of cases deferring to the CAB's jurisdiction over all questions with respect to implementation or modification of labor protective provisions in connection with carrier mergers. 510 F.2d at 857, 860. Dicta[10]

[10] The Court of Appeals for the Eighth Circuit held that *Augspurger* was not a fair representation case and that in that case the complaint had been properly dismissed.

in *Augspurger* stated that an exception to that rule must be carved out when the issue is one of fair representation by a union, but, inasmuch as there is no hint of a fair representation question in the present case, those dicta are not relevant. Indeed, the Eighth Circuit in *Augspurger* stressed the great importance of the principle that the federal courts not invade agency jurisdiction and said that therefore the exception for fair representation cases should be defined very narrowly. The holding of *Augspurger* not only is not contrary to but rather is fully in accordance with and supports the decision of the First Circuit in the present case.

III. The law is well settled that the CAB has exclusive jurisdiction over questions of representation pursuant to the Railway Labor Act.

There can be no doubt that the question whether a union is entitled to represent and bargain for employees of a carrier pursuant to the Railway Labor Act may be decided only by the NMB and not by the courts. *Switchmen's Union of North America* v. *NMB*, 320 U.S. 297, 305. Representation disputes are within the exclusive jurisdiction of the NMB — and not justiciable in the federal courts — whether they are disputes between unions, *General Committee of Adjustment* v. *Missouri - K. - T. R.R.*, 320 U.S. 323, 327-28, 336, or arise in the context of individual grievances, *General Committee of Adjustment* v. *Southern Pac. Co.*, 320 U.S. 338, 342-44. It has been held repeatedly and without exception that all representation questions in the airline industry are within the NMB's exclusive jurisdiction. *FEIA* v. *Eastern Air Lines, Inc.*, 359 F.2d 303 (2d Cir. 1966); *FEIA* v. *CAB*, 332 F.2d 312 (D.C. Cir. 1964); *Ruby* v. *American Airlines, Inc.*, 323 F.2d 248 (2d Cir. 1963); *FEIA* v. *Eastern Air Lines, Inc.*, 311 F.2d 745 (2d Cir. 1963), *cert. denied*, 373 U.S. 924; *FEIA* v. *Trans World Airlines, Inc.*, 205 F. Supp. 137 (S.D. N.Y. 1962).

A. *The claim of the Union to bargain with Delta post-merger raised a question of representation of which the NMB has exclusive jurisdiction.*

The decision of the Court of Appeals for the First Circuit that the Northeast/Delta "merger created real doubts about whether [the Union] represent[s] the majority of any Delta craft or class of employees" (536 F.2d at 977) was plainly correct. The Union alleged in its amended complaint that Delta "with its 20,786 employees will be under no obligation to recognize or deal with the IAM [Union] which only represents approximately 1,000 employees." (A-II at 36.) Indeed, it is evident that the Union represented no more than a rather small minority of any craft or class of Delta employees.[11]

The rule that the NMB has exclusive jurisdiction is no less applicable in representation disputes which arise out of or in connection with mergers of carriers. See, *e.g.*, *Division No. 14, Order of Railroad Telegraphers* v. *Leighty*, 298 F.2d 17 (4th Cir. 1962), *cert. denied*, 369 U.S. 885; *Burlington Northern Inc.* v. *American Ry. Supervisors Ass'n*, 350 F. Supp. 897 (N.D. Ill. 1972). Nor can the

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[11] The Union has stated to this Court (Petition at 11 n.6) that former Northeast employees who had been represented by the Union before the merger constituted only "25 to 30%" of the Delta employees in the respective crafts or classes. In contrast, the NMB has determined by regulation a threshold requirement of "proved authorizations" from 35 per cent of the employees in the craft or class as a prerequisite for the NMB to schedule an election when the employees involved are not represented by any union. 20 C.F.R. § 1206.2(b). It is clear that a union cannot represent only a fraction of the employees of a single carrier who fall into one craft. 45 U.S.C. § 152 Fourth; see, *e.g.*, *Burlington Northern Inc.* v. *American Ry. Supervisors Ass'n*, 350 F. Supp. 897, 901-03 (N.D. Ill. 1972) and authorities cited therein.

Union confer upon the courts jurisdiction to determine the Union's representational rights vis-a-vis Delta as the surviving carrier merely by characterizing this action as one based upon its former collective bargaining agreement. *Railway and Steamship Clerks* v. *United Air Lines, Inc.*, 325 F.2d 576 (6th Cir. 1963), *cert. dismissed as improvidently granted*, 379 U.S. 26.

In the circumstances there can be no doubt that the Union's demand that Delta "recognize and bargain with" the Union raises a representation question which, in accordance with well-established principles, is within the exclusive jurisdiction of the NMB. Accordingly the court below correctly held that question not justiciable in the present case.

B. *The decision of the court below was not in conflict with any precedent.*

The Union's reliance upon *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543 as granting the Union a right to bargain with Delta is entirely misplaced. The keystone of all the Union's arguments based on *Wiley* is its disingenuous assertion that to distinguish between "the duties to bargain and to arbitrate . . . is meaningless." (Petition at 12.) In fact, that there is an important distinction between arbitration and negotiation is apparent from the National Labor Relations Act ("NLRA") itself[12] and from this Court's opinion in *Wiley*. As the court below held, "*Wiley* required the employer to submit to arbitration, but did not require negotiation with the union, which is quite a different duty." 536 F.2d at 978.

[12] The provisions for negotiation are found in Sections 8(a)(5), 8(b)(3) and 8(d), 29 U.S.C. §§ 158(a)(5), (b)(3), (d), whereas arbitration is enforceable pursuant to Section 301, 29 U.S.C. § 185.

This Court's opinion in *Wiley* carefully noted that no obligation for the successor to negotiate with a former representative of a pre-merger bargaining unit was being imposed. "This Union does not assert that it has any bargaining rights independent of the [predecessor employer's collective bargaining] agreement; it seeks to arbitrate claims based on that agreement, now expired, not to negotiate a new agreement." 376 U.S. at 551. (Footnote omitted.) "Of course, the Union may not use arbitration to acquire new rights against" the successor; nor could the Union "have used arbitration to negotiate a new contract with" the predecessor. 376 U.S. at 555. It is clear that this Court in *Wiley* recognized a fundamental distinction between the duty to arbitrate and the duty to bargain.

The difference between negotiation and arbitration, which the court below quite correctly recognized, is at the heart of the Railway Labor Act. This Court's decision in *Wiley* was concerned only with arbitration as a means of enforcement of rights which had "vested" or "accrued" pre-merger (376 U.S. at 545, 551-52 n.5) and which, in the language of the Railway Labor Act, would be called "minor disputes" — disputes "arising out of the interpretation or application of collective agreements", *Detroit & T. S.L.R.R.* v. *United Transportation Union*, 396 U.S. 142, 145 n.8. In the context of the Railway Labor Act, it is well settled that the only permissible litigation to determine minor disputes is arbitration before the System Board of Adjustment. "[T]he notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, was never good history and is no longer good law." *Andrews* v. *Louisville & N.R. Co.*, 406 U.S. 320, 322; see cases cited page 11 *supra*.

In the present case the Union does not allege that any grievance proceedings are outstanding or that Delta has refused to submit any particular dispute to the System Board of Adjustment. Indeed, the record shows that, when the Union did submit its claims to the System Board in 1972, the neutral arbitrator decided against the Union.[13] The Union cannot now take a second bite at that apple.

Moreover, the *Wiley* decision is not applicable to the present case because *Wiley* was a decision under the NLRA, whereas Northeast was and Delta is an air carrier subject to the Railway Labor Act and not to the NLRA. Particularly in view of the specific machinery for the System Board of Adjustment in Section 204 of the Railway Labor Act, 45 U.S.C. § 184 (p. 28 *infra*), the *Wiley* decision cannot be translated from the NLRA into the quite different statutory framework of the Railway Labor Act. It is well recognized that there are basic differences "in the language and scheme of the two statutes." *Ruby* v. *American Airlines, Inc., supra,* 323 F.2d at 256.

Furthermore, *Wiley* is inapplicable to the present case because all relevant grievances filed before the expiration of the collective bargaining agreements between Northeast and the Union have been finally decided through arbitration before the System Board of Adjustment and none is pending. In *Wiley* this Court stressed the fact that the contract between the union and the predeccessor was, according to its terms, still in force when grievances were filed. 376 U.S. at 546. In contrast, in the present case both collective bargaining agreements between Northeast and

[13] The Union has made no attempt to vacate that award pursuant to the Railway Labor Act. See 45 U.S.C. §§ 153 First (q), 184. Nor has the Union ever presented any other grievance for adjudication by the System Board of Adjustment. (A-II at 45.) The System Board's ruling that the grievance filed in 1972 was tardy further suggests that no more grievances could be effectively filed now, some four and one-half years later.

the Union by their terms had expired a number of months before the merger. (See p. 4 n.3 *supra.*)

Finally, the NLRA successorship doctrine, which is the foundation on which the *Wiley* decision is built, is premised upon the continuity of at least a majority of employees in an appropriate bargaining unit. See *Howard Johnson Company, Inc.* v. *Detroit Local Joint Executive Board, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO,* 417 U.S. 249, 263; *National Labor Relations Board* v. *Burns International Security Services, Inc.,* 406 U.S. 272, 295. As this Court stated in *Wiley,* there must be such a "substantial continuity of identity in the business enterprise" as to "make a duty to arbitrate something . . . reasonably to be found in the particular bargaining agreement and the acts of the parties involved." 376 U.S. at 551. In view of the absence of a "substantial continuity of identity in the business enterprise", the Railway Labor Act's requirement that nothing less than an entire craft or class shall constitute an appropriate bargaining unit,[14] and the Union's admission that the employees it seeks to represent are but a minority of any craft or class (see p. 21 *supra*), Delta could not be found to be a "successor" even if the NLRA successorship doctrine could be applied to air carriers governed by the Railway Labor Act. A vital ingredient would be missing because ex-Northeast mechanics clearly do not comprise a majority (or even close to a majority) of the only appropriate bargaining unit — all mechanics employed by Delta.

[14] Section 2 Fourth, 45 U.S.C. § 152 Fourth. In contrast, under the NLRA a single-plant unit is presumptively appropriate. *Dixie Belle Mills, Inc.,* 139 N.L.R.B. 629, 631 (1962); see 29 U.S.C. § 159(b).

Conclusion

For the reasons stated, the Court should deny the Petition for a Writ of Certiorari to review the judgment and opinion of the Court of Appeals for the First Circuit.

Respectfully submitted,

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Appendix

RAILWAY LABOR ACT,
SECTION 2 FOURTH, 45 U.S.C. § 152 FOURTH:

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

RAILWAY LABOR ACT,
SECTION 204, AS ADDED, 45 U.S.C. § 184:

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of sections 181 to 188 of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees . . . .

FEDERAL AVIATION ACT OF 1958,
SECTION 408, AS AMENDED, 49 U.S.C. § 1378:

(a) It shall be unlawful unless approved by order of the Board as provided in this section—

(1) For two or more air carriers, or for any air carrier and any other common carrier or any person

engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships . . . .

(b) Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe. . . .

FEDERAL AVIATION ACT OF 1958,
SECTION 1006, 49 U.S.C. § 1486:

(a) Any order, affirmative or negative, issued by the Board or Administrator under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 1461 of this title, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the

expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Board or Administrator by the clerk of the court, and the Board or Administrator shall thereupon file in the court the record, if any, upon which the order complained of was entered, as provided in section 2112 of Title 28.

(d) Upon transmittal of the petition to the Board or Administrator, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Administrator. Upon good cause shown and after reasonable notice to the Board or Administrator, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate.

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Administrator shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of Title 28.

Order 72-12-114

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
Washington, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.,
on the 26th day of December, 1972

Docket 23315

DELTA-NORTHEAST MERGER CASE

ORDER

In Order 72-5-73, the Board approved the merger of Delta Air Lines and Northeast Airlines[1] subject however to certain labor protective conditions. Thereafter, but prior to the consummation of the merger, the International Association of Machinists and Aerospace Workers (the IAMAW) petitioned the Board to modify those labor protective conditions to the extent of requiring Delta to recognize the seniority rights of Northeast's employees in connection with the application of the labor protective conditions. The IAMAW also requested that the Board stay the effectuation of the merger pending disposition of the petition. The gravamen of the petition is that Delta had demonstrated an "attitude" and "intent" indicating that Delta would not give adequate consideration to employee seniority once the merger was effectuated, that under the circumstances of the merger, Northeast employees could thereby lose their seniority rights, and that "lacking recognition of seniority rights, Northeast employees can be harassed by Delta into resigning."

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[1] Order 72-5-74 approved the merger insofar as it related to the transfer to Delta of Northeast's international routes.

In the Board's Supplemental Opinion and Order in this proceeding, Order 72-7-74, the Board denied the IAMAW request for a stay and otherwise deferred action on the petition. We there noted that:

> "At this juncture . . . any harassing by Delta remains largely, if not entirely, hypothetical, and indeed may never come to pass. Further, to the extent that harassment takes the form of violations of the Board's labor protective conditions, the conditions themselves provide a remedy—arbitration pursuant to a specified, expedited, process."[2]

We have received no further filings by the IAMAW that would indicate that the potential problems that concerned the IAMAW have in fact come to pass, nor have we any other reason to believe that there have arisen any merger-related problems within the purview of the labor protective conditions that cannot be resolved by negotiation between the groups involved, or by arbitration as provided in section 13 of the labor protective conditions. Further, as we noted in our Supplemental Opinion and Order, the Board is always in a position, through exercise of its retained jurisdiction, to make such amendments, modifications, and additions to the labor protective conditions as the circumstances may require.

In view of the foregoing, we have determined to dismiss the IAMAW petition.

ACCORDINGLY, IT IS ORDERED: That the petition of the International Association of Machinists and Aerospace Workers for amendment, modification, and additions to the labor protective conditions set forth in Order 72-5-73 be and it hereby is dismissed.

By the Civil Aeronautics Board:

HARRY J. ZINK
Secretary

(SEAL)

[2] Order 72-7-74 at 17.

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 75-1066 September Term, 1974

COMMITTEE OF FORMER NORTHEAST STEWARDESSES,
PETITIONER
v.
CIVIL AERONAUTICS BOARD,
RESPONDENT.

DELTA AIR LINES, INC.,
INTERVENOR.

Before: McGOWAN AND TAMM, *Circuit Judges*

ORDER

On consideration of the petitioner's motion for summary reversal and of the responses thereto, and of the respondent's motion for summary affirmance and of the responses thereto, and it appearing to the Court that the issue presented by the petition for review herein has been decided by the Court in *Carey* v. *J. J. O'Donnell*, — U.S. App. D.C. —, 506 F.2d 107 (1974), *cert. denied*, 42 L. Ed. 806 (1975), it is

ORDERED by the Court that order No. 75-1-6 of the Civil Aeronautics Board is hereby reversed, and the case remanded to the Board for a decision on the merits of petitioner's claims; and it is

FURTHER ORDERED that the respondent's motion for summary affirmance is denied. *See also Northeast Master Executive Council* v. *Civil Aeronautics Board*, — U.S. App.

D.C. —, 506 F.2d 97 (1974), *cert. denied*, 95 S. Ct. 783 (1975); *Kesinger* v. *Universal Airlines, Inc.*, 474 F.2d 1127 (6th Cir. 1973); *Oling* v. *Air Line Pilots Association*, 346 F.2d 270 (7th Cir.), *cert. denied*, 382 U.S. 926 (1965).

Per Curiam